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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MANUEL SANCHEZ-HERNANDEZ, Appellant.	)	2 CA-CR 2009-0342 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072532

Honorable Nanette M. Warner, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Manuel Sanchez-Hernandez appeals his first-degree murder conviction, arguing the state presented insufficient evidence to support it. Finding no error, we affirm.

Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In March 2007, R., the victim in this case, checked into a Tucson motel located near the interstate highway and Sanchez-Hernandez joined her in the room. The next morning, a motel employee found R.'s body in the bathroom. She had been shot a single time; the bullet traveled through her right hand and into the back of her head where it lodged in her brain, killing her.

¶3 The following day, members of R.'s family were unable to contact her and when they telephoned Sanchez-Hernandez he did not answer, but his outgoing message contained statements referring to R. and how she had gone "crazy" and had "got[ten] mad and left." They gave police a photo of Sanchez-Hernandez and R.'s mother told officers that on the night before the murder she had heard Sanchez-Hernandez talking to R. on the phone and had heard him say "I am not playing, I am not fooling around, ... If you want to leave it at that, that's fine."

¶4 In June 2007, Sanchez-Hernandez admitted to a girl he was dating that he had killed a woman in a motel near the highway. The girl was aware of a murder at the motel and became afraid of him, ending their relationship. Sanchez-Hernandez was arrested later that month. The state charged him with first-degree murder and, after a jury trial, he was convicted as charged.[1] The trial court sentenced Sanchez-Hernandez to life in prison with the possibility of parole after twenty-five years. This appeal followed.

[1]Sanchez-Hernandez inexplicably maintains on appeal that the trial court did not instruct the jury on second-degree murder or manslaughter. But the record clearly shows the court did instruct the jury on those offenses and included them on the verdict form as well.

Discussion

¶5 In the sole issue raised on appeal, Sanchez-Hernandez maintains there was insufficient evidence to sustain his conviction, specifically arguing "[t]here was no evidence of premeditation in this case." We review the sufficiency of evidence presented at trial to determine if substantial evidence exists in support of the verdict. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence is more than a mere scintilla"; it is evidence that would permit a reasonable jury to conclude beyond a reasonable doubt that the defendant committed the charged offense. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "To set aside a conviction because of insufficient evidence, 'it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the [trier of fact].'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶6 A person commits first-degree murder if, "[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." A.R.S. § 13-1105(A)(1).

> "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101(1).

¶7 Premeditation can "be proven by circumstantial evidence; like knowledge or intention, it rarely can be proven by any other means." *State v. Ramirez*, 190 Ariz. 65, 69, 945 P.2d 376, 380 (App. 1997). And a trier of fact may consider all circumstances

and facts of an offense. *See State v. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d 420, 428 (2003). Ultimately, "[t]o establish premeditation, 'the state must prove that the defendant acted with either the intent or knowledge that he would kill his victim and that such intent or knowledge preceded the killing by a length of time permitting reflection.'" *State v. Ellison*, 213 Ariz. 116, ¶ 66, 140 P.3d 899, 917 (2006), *quoting State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995).

¶8 In this case, when Sanchez-Hernandez told the girl he was dating about the murder, he said he had been in the shower in the hotel room when he had heard R. talking on the phone, "calling some guys to come and take his truck and his jewelry." He told her that when he had gotten out of the shower and asked R. about the call, she had "denied everything." He then had killed her. That testimony was sufficient for the jury to conclude that Sanchez-Hernandez had acted with the intent to kill R and with sufficient time for reflection. *See id.*

¶9 Additionally, the coroner testified R. had been shot in the back of the head, did not have any defensive wounds, and had not sustained any other injuries consistent with a fight or a struggle. She also testified the entry wound on R.'s hand, which would have been behind her head when shot, shows evidence of "contact range firing," indicating "the end of the gun . . . was up against the skin when it was discharged." This "is inconsistent with a heat-of-passion murder"[2] and instead further supports premeditation. *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996); *cf.*

[2]We note that Sanchez-Hernandez's defense at trial was not that he had shot R. in the heat of passion, but that he had not committed the offense at all. Counsel on appeal therefore may not now argue that his "motivation shows that he clearly committed the offense in the heat of passion." *See State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) ("One cannot premise fundamental error upon a new theory of the case constructed on appeal.").

Murray, 184 Ariz. at 32, 906 P.2d at 565 (victims shot repeatedly in back of head while on stomachs showed sufficient time to permit reflection). In sum, the state presented sufficient evidence for the jury to conclude that Sanchez-Hernandez had committed premeditated, first-degree murder and we will not set aside his conviction. *See Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d at 394.

Disposition

¶10 Sanchez-Hernandez's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge